Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the	)	
	)	
AT&T Petition for Forbearance From the	)	WC Docket No. 03-256
“Deemed Lawful” Provisions of	)	
Section 204(a)(3) of the Communications Act	)	

OPPOSITION OF SUREWEST COMMUNICATIONS

FLETCHER, HEALD & HILDRETH, PLC
1300 North 17th Street
11th Floor
Arlington, Virginia 22209
(703) 812-0400

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SUMMARY

SureWest Communications opposes the Petition filed by AT&T Corp. seeking forbearance from enforcement of the "deemed lawful" provisions of Section 204(a)(3) of the Communications Act ("Petition"). As shown herein, not only does the AT&T Petition fail under the Section 10 forbearance criteria, it is in fact an attempt to turn Section 10 on its head by using it to impose regulatory burdens (on carriers other than AT&T), rather than to relieve regulatory burdens. Furthermore, with this Petition, AT&T is trying to obtain through a different means, a result that the Commission has already rejected twice in the *Streamlined Tariff Filing* proceeding as inconsistent with Congressional intent.

While AT&T's Petition is cleverly structured as a petition for forbearance under Section 10(c) of the Communications Act, in fact the relief it seeks is identical to that it sought in comments and a petition for reconsideration in the *Streamlined Tariff Filing* proceeding – an impermissible nullification of the "deemed lawful" language in Section 204(a)(3) of the Communications Act. In that proceeding, the Commission found that the term "deemed lawful" had an "unambiguous meaning" with "significant legal consequences" for a tariff so deemed lawful: that customers who purchased services pursuant to that rate are not entitled to damages if the tariffed rate earns more than the targeted rate of return. In acknowledging those consequences, the Commission stated that it made its finding "based on the language of the statute, that this is the balance between consumers and carriers that Congress struck when it required eligible streamlined tariffs to be deemed lawful." While AT&T opposed this reading and the necessary result, first in comments and then in a petition for reconsideration in that proceeding, the Commission twice rejected AT&T's arguments as inconsistent with the language and intent of Section 204. The Commission cannot ignore the mandate of Section 204(a)(3) in this proceeding, either. Any action to give AT&T here, what the Commission twice previously recognized it cannot give under a different context, will certainly be appealed, and the result will be reversal of the Commission action. Such a course would be an unconscionable waste of the resources of the Commission and other interested parties.

The current Petition also fails on the merits. In regards to the general sufficiency of the Petition, it must be noted that AT&T provides little hard evidence to support its assertions, other than a Summary of alleged "overearnings" by certain rate of return ILECs during a two year period. As shown herein, the Summary is very misleading, and in any case constitutes an insufficient basis for grant of a forbearance petition, especially one that seeks on-going or permanent forbearance of a statutory mandate. AT&T has herein advanced no new public policy concerns or unforeseen circumstances to justify a request that in essence constitutes an untimely petition for reconsideration of the holdings in the *Streamlined Tariff* proceeding.

The Petition also fails to meet the specific Section 10(a) criteria for grant of a forbearance petition. In regards to the assurance of reasonable charges criterion, AT&T fails to demonstrate that forbearance from enforcement of the "deemed lawful" provisions of the Act would in fact reduce the access rates filed by any ILEC. AT&T appears to rely solely on the false stereotype that ILECs are devoted to overcharging their customers, and the related but totally unsupported assumption that an extended opportunity for access customers to file complaints will "scare" ILECs away from such behavior. Furthermore, AT&T fails to demonstrate that forbearance from the "deemed lawful" provisions would significantly reduce the total access charges paid by any interexchange carrier ("IXC") or the IXC industry as a whole. Even taking the figures provided in Exhibit 1 to the Petition, the total amount of "overearnings" is less than one percent of the total amount paid by all IXCs in any one year for access.

In regards to the Section 10(a) consumer protection criterion, AT&T ignores the "consumers" that Congress appeared to be referring to in Section 10(a)(2) – end users. Yet, evaluating the matter from the end user perspective is informative, since it appears that forbearance is likely to have little or no impact on the rates paid by end users. Because Section 254(g) of the Act requires IXCs to average interstate interexchange rates on a nationwide basis, the Commission has already found that any increase in access rates charged to IXCs would have a *de minimus* impact on interexchange rates charged to individual consumers. Similarly, the Petition fails to meet the "public interest" criterion: while AT&T suggests that forbearance would remove an "anti-competitive" protection for ILECs, this argument fails because LEC provision of access services and IXC provision of interexchange services are two <u>different services</u>, and two <u>different product markets</u>. The fact that a regulation of one service in one product market is different than the regulation of a different service in a different product market, does not mean that the difference is anti-competitive. Even if AT&T is referring to the competitive impact on itself as a CLEC, this fails, since CLECs as well as ILECs may use the mechanism set forth in Section 204(a)(3).

Lastly, not only does the Petition fail to meet the Section 10 criteria, grant of the Petition would in fact turn Section 10 on its head, by using that Section to <u>impose</u> regulatory burdens (on incumbent local exchange carriers), rather than to <u>relieve</u> regulatory burdens. Indeed, the Commission has already found in the *Streamlined Tariff Filings* proceeding that "Congress intended [through the use of Section 10] to <u>reduce or eliminate</u> regulation as competition develops...." AT&T's Petition would not reduce or eliminate regulation of LECs, it would <u>increase</u> it. AT&T would also turn Section 10 on its head by having forbearance applied <u>not to AT&T</u> as the petitioner, but rather <u>only to other</u> carriers. This approach is flatly inconsistent with the language of Section 10(c). The Commission should not allow AT&T to impermissibly use the Section 10 process in this manner, *i.e.,* to use the process as a "sword" rather than as a "shield."

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OPPOSITION OF SUREWEST COMMUNICATIONS

SureWest Communications, by its attorneys, hereby opposes the Petition for Forbearance ("Petition") filed by AT&T Corp. on December 3, 2003 in the above-captioned docket, seeking "forbearance" from enforcement of the "deemed lawful" provisions of Section 204(a)(3) of the Communications Act.[1] As shown below, not only does the AT&T Petition fail under the Section 10 forbearance criteria, it is in fact an attempt to turn Section 10 on its head by using it to impose regulatory burdens (on local exchange carriers), rather than to relieve regulatory burdens. Furthermore, with this Petition, AT&T is trying to obtain through a different means, a result that the Commission has already rejected twice in the *Streamlined Tariff Filing* proceeding as inconsistent with Congressional intent.[2] Yet, there is no evidence that the Congressional intent behind Section 204(a)(3) has changed since the last time the Commission rejected AT&T's attempt to obtain the very same relief.

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1 *See* Public Notice DA 03-4076, released December 24, 2003.

2 *See*, Implementation of Section 402(b)(1)(A) of the Telecommunications Act, Report and Order, 12 FCC Rcd 2170 (1997) ("*Streamlined Tariff Filing R&O*"), *affirmed on reconsideration*, 17 FCC Rcd 17040 (2002) ("*Streamlined Tariff Filing Recon. Order*").

I. Introduction

SureWest Communications ("SureWest") is a facilities-based provider of telecommunications services, located in Northern California. Through its subsidiary companies, SureWest provides incumbent local exchange, competitive local exchange, interexchange, cable television, broadband and PCS services. SureWest's subsidiary SureWest Telephone Company ("STC")[3] is an incumbent local exchange carrier ("ILEC") serving subscribers in 83 square miles of Placer County, California. STC currently serves approximately 136,000 access lines. STC is subject to federal rate-of-return ("ROR") regulation of its provision of interstate access services.

II. AT&T is Trying to Obtain Through a Different Means, the Relief the Commission Has Already Twice Rejected in the *Streamlined Tariff Filing* Proceeding As Inconsistent With Congressional Intent.

While AT&T's Petition is cleverly structured as a petition for forbearance under Section 10(c) of the Communications Act, in fact the relief it seeks is identical to that it sought in comments and a petition for reconsideration in the *Streamlined Tariff Filing* proceeding – an impermissible nullification of the "deemed lawful" language in Section 204(a)(3) of the Communications Act. Nevertheless, the Commission twice rejected AT&T's arguments as inconsistent with Congressional intent, and there is no basis for enacting a different result in response to AT&T's third "bite at the apple."

Notwithstanding arguments to the contrary made by AT&T, in the *Streamlined Tariff Filing R&O*, the Commission found that the term "deemed lawful" had an "unambiguous meaning" that such a rate is "conclusively presumed to be reasonable" if

[3] Until recently, SureWest's ILEC subsidiary was named Roseville Telephone Company ("RTC"). RTC commenced provision of service in 1914.

it takes effect without prior suspension or investigation. 12 FCC Rcd at 2182. The Commission then went on to acknowledge the "significant legal consequences" of a tariff being deemed lawful: that customers who purchased services pursuant to that rate are not entitled to damages if the tariffed rate earns more than the targeted rate of return. *Id*. at page 2182-83. In acknowledging those consequences, the Commission stated that it found "based on the language of the statute, that this is the balance between consumers and carriers that Congress struck when it required eligible streamlined tariffs to be deemed lawful." *Id*. at 2183 (emphasis added).

Having made such a finding of Congressional intent, the Commission was required to act as it did.[4] Nevertheless, in a Petition for Reconsideration, AT&T again argued for an interpretation of "deemed lawful" under which a tariff filed on a streamlined basis and not suspended and investigated would be "presumed" lawful, but such presumption could be rebutted. However, the Commission again rejected that approach, noting that its finding on the Congressional intent behind Section 204(a)(3) was upheld by the D.C. Circuit in the case of ACS of Anchorage, Inc. v. FCC, 290 F.3d 406 (2002)("*ACS*"). *Streamlined Tariff Filing Recon. Order*, 17 FCC Rcd at 17042. The Commission went on to note that "[g]iven the court's conclusion, we cannot adopt the reading urged by AT&T...." *Id.*

The Commission was wise to recognize that it cannot avoid the plain language of Section 204, or ignore the D.C. Circuit's holding in the *ACS* case. That was because

[4] The Commission properly found Congressional intent to be explicitly stated in the language of the statutory section, and thus it did not (and could not under controlling precedent) look to any legislative history for further guidance. *Id.* at page 2182 and at note 64, *citing* Chevron USA, Inc. v. National Resource Defense Council, 104 S.Ct. 2778 (1984).

the *ACS* court severely criticized the Commission and reversed the Commission's action below, where the Commission had previously attempted to get around the barrier to recovering damages created by Section 204(a)(3), and by the Commission's own finding in the *Streamlined Tariff Filing R&O*. The Court criticized the Commission for "overlooking ... its statutory mandate" (290 F.3d at 411), for relying on arguments that were "mystifying" (*id.* at 412), and for being "confused" (*id*. at 413).

The Commission would be equally wise to recognize that it cannot ignore the mandate of Section 204(a)(3) in this proceeding as well. Any action to give AT&T here, what the Commission twice previously recognized it cannot give under a different context, will certainly be appealed, and the result can be easily predicted: reversal *a la* the *ACS* case. Such action would be an unconscionable waste of the resources of the Commission and other interested parties.

III. The Petition Not Only Fails to Meet the Section 10 Criteria, It Impermissibly Turns the Section 10 Process on Its Head.

Even if the Commission were to ignore the lessons of the *ACS* case, and address the AT&T Petition on its merits alone, the Commission would have to deny the Petition. This is because the Petition not only fails to meet the criteria set out in Section 10(c) of the Act, but it impermissibly attempts to turn the Section 10 process on its head by using it to impose regulatory burdens on other carriers, rather than to relieve regulatory burdens on itself. This is the epitome of anti-competitive action, and is thus blatantly contrary to the intent of Section 10.

First, in regards to the general sufficiency of the AT&T Petition, it must be noted that the Petition provides little hard evidence to support its assertions, other than a list of alleged inflated “overearnings” by certain rate of return ILECs during a two year period.[5] This is an insufficient basis for grant of a forbearance petition, especially one that seeks on-going or permanent forbearance of a statutory mandate. In addition, AT&T has

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[5] The “Summary” chart in Exhibit 1 appears to be merely a recital of information from Form 492 filings. In fact, however, it is a misleading analysis that depicts a unique period where changes in technology, shifts of revenue sources, and unexpected demand occurred in special access services. Ignored in the analysis is the amount of underearnings by companies indicated in the Summary. Furthermore, the additional gross ups reflected in the Summary do not enable any party to tie the numbers to the data submitted to the Commission. These and other factors skew the actual impact on AT&T and other IXCs during this two-year period.

AT&T’s “overearnings” amounts are greatly overstated, in part because its Summary ignores underearnings in the Switched Traffic Sensitive category for a number of carriers. For example, while the Summary reflects that Virgin Islands Telephone Company’s rate of return on Switched Access was only 2.35%, rather than showing the underearnings as a negative amount, it merely shows a “-“. By fairly listing such underearnings, and subtracting them from the “overearnings,” at least 19% of the total Switched Access “overearnings” would be reduced. This was determined by analysis of Form 492 filings by several of the companies listed on the Exhibit 1 including Chillicothe Telephone Company, Virgin Islands Telephone Corporation, Alltel Communications, Puerto Rico, TXU Communications, Coastal Utilities, Farmers Telephone Cooperative, Fort Bend Telephone Company, Horry Telephone Company and Warwick Telephone Company.

In addition to ignoring underearnings within categories of access service, AT&T’s analysis also leaves out evidence regarding variations from different years where an ILEC’s total access rates underearned their targeted rate of return. *See* page 11 and note 11 *infra.*

Another area of earnings shifts that took place during the 2001-2002 earnings period occurred in the Special Access category. There was a much greater and unexpected growth in demand for Special Access Advanced services during that period than in prior years. This aberration was adjusted for in the development of the new demand units in the following rate period. Naturally, AT&T does not mention changes in special access pricing in the subsequent tariff period.

Even if AT&T’s historical analysis were correctly and completely presented, AT&T’s myopic approach to regulatory analysis fails to address (or mention) well known FCC revisions to the regulatory mechanism that have occurred which have and will impact ILEC earnings. For example, the implementation of the MAG plan will have significant impacts on the interstate earnings of rate-of-return ILECs. The MAG plan shifts significant revenue requirements from Traffic Sensitive to Common Line. This includes the TIC reallocation and the shift of 30% of Local Switching costs to Common Line. The ICLS mechanism was established to ensure that rate-of-return companies’ earnings would be limited to 11.25% return on rate base. Therefore, based on the functioning of the ICLS mechanism, Common Line will be a larger share of the interstate revenue requirement with returns limited to 11.25%. This applies to all rate-of-return companies, whether or not each company participates in the NECA Common Line Pool. The most recent results of End User revenues reflect the radical shifts from Switched Access to the End User category. In 2000, 59% of the total revenues for Switched Access and End User revenues were End User Revenues. For 2002, 72% of that total was End User Revenues. *See* Table 4.2, 2002 Statistics of Communications Common Carriers, released by the Commission on November 10, 2003.

herein advanced no new public policy concerns or unforeseen circumstances to justify a request that in essence constitutes an untimely petition for reconsideration of the holdings in the *Streamlined Tariff* proceeding.[6] In the *Streamlined Tariff* proceeding, the Commission explicitly recognized that some carriers would earn more than their rate of return target. 12 FCC Rcd at pages 2182-83. Yet it is such earnings that are the basis for the relief sought in AT&T's Petition.

In addition to these general flaws, an analysis of the AT&T Petition shows that it fails to meet the specific Section 10(a) criteria for evaluating and granting forbearance petitions.

A. AT&T's Petition Fails to Meet the Reasonable Charge Criterion.

The first criterion for evaluating petitions under Section 10(a)(1) requires an analysis of whether enforcement of the provision is unnecessary to ensure that charges are just, reasonable and non-discriminatory. AT&T argues that forbearance from enforcement of the deemed lawful provisions not only meets this criterion, but is "indispensable to assure that access customers ... are charged reasonable rates." Petition at page 14. In support of this argument, AT&T asserts that 1) some ILECs are earning more than their targeted rate of return, and 2) the complaint process leading to suspension and investigation of streamline tariff filings is not working due to "abbreviated [procedural] timelines" and the "Commission's scarce administrative resources." *Id*. This argument is fatally flawed.

[6] *Cf.,* Iowa Telecommunications Services, Inc. Forbearance Petition Order, 17 FCC Rcd 24319 (2002) at para. 13 (hereinafter, "*Iowa Telecom*").

There seemed to be little dispute in the *Streamlined Tariff Filings* proceeding that the fifteen-day notice period and associated pleadings cycle for filings that propose rate increases is sufficient. AT&T's Petition for Reconsideration in that proceeding primarily addressed the pleading cycle for proposed rate decreases which have a seven-day notice period. The Commission rejected that petition, properly noting that rate decreases typically raise few regulatory concerns, and confer immediate benefits on customers. *Streamlined Tariff Filings Recon. Order*, 17 FCC Rcd at 17044. AT&T's current Petition for Forbearance adds little if any substance to the issue. First, AT&T asserts that "thousands" of streamlined tariff filings have been made, but only a "minuscule proportion" have been suspended and investigated, which AT&T asserts results from tight procedural deadlines and lack of Commission resources. AT&T Petition at pages 14-15. Yet, AT&T provides no logic or evidence connecting the facts (few suspensions) and the alleged causes (tight timelines and few Commission resources).[7] In fact, the limited number of suspensions most likely arises from the fact that most tariff filings do not raise any substantive issues, especially issues demonstrating a *prima facie* violation of the Act or the Commission's rules, which is the standard for suspending and investigating a tariff filing.[8]

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[7] AT&T also makes flawed arguments about the complaint process, lamenting that the formal complaint process "requires litigants to provide detailed supporting information and extensive documentation, and that the complaint process is so "time consuming and costly" that there is an economic disincentive to file such complaints. AT&T Petition at note 27. Yet, it is hard to sympathize with AT&T's lament that complainants must substantially document their charges before the Commission and opposing parties be obligated to spend significant resources responding: such a requirement is a matter of basic procedural fairness and administrative efficiency.

[8] See ITT World Communications Inc., 73 FCC 2d 709, 718 (1979).

More importantly, the AT&T Petition fails to demonstrate that forbearance from enforcement of the "deemed lawful" provisions of the Act would in fact reduce the access rates filed by any ILEC. AT&T appears to rely solely on the false stereotype that ILECs are devoted to overcharging their customers, and the related but totally unsupported assumption that an extended opportunity for access customers to file complaints will "scare" ILECs away from such behavior. However, AT&T provides no facts or precedent supporting this argument, and the Commission cannot properly forbear from enforcing Section 204 of the Communications Act on the basis of false stereotypes and unsupported assumptions.

Lastly, the AT&T Petition fails to demonstrate that forbearance from the "deemed lawful" provisions would significantly reduce the total access charges paid by any interexchange carrier ("IXC") or the IXC industry as a whole. Even taking the figures provided in Exhibit 1 to the Petition, the total amount of "overearnings" is a minuscule portion of the total amount paid by all IXCs in any one year for access.[9] In light of the fact that IXCs can file petitions to suspend any tariff they choose in order to protect themselves from over-charges, the burden imposed on ILECs and the Commission by the proposed forbearance far outweighs any as of yet undemonstrated potential for IXCs to recover a minuscule amount of alleged overcharges.

[9] AT&T's Exhibit shows approximately $159 million in total rate of return in alleged ILEC "overearnings" for the two years 2001-02. However, the total interstate access market for the year 2001 alone was approximately $15 billion. *See* 2002 Statistics of Communications Common Carriers, at page 210 (released November 10, 2003). Thus, even if AT&T's use of the figures in Exhibit 1 were valid (a premise that SureWest does not concede), the "overearnings" cited therein constituted less than one percent of the total amount paid for interstate access services.

B. The Petition Fails to Meet the Consumer Protection Criterion.

The second Section 10(a) criterion requires evaluation of whether enforcement of the provision in question is necessary for the protection of consumers. In its Petition, AT&T essentially asserts that this criterion would be fulfilled by the proposed forbearance, with little argument to back it up. This bare assertion does not meet the burden of proof that any petitioner must fulfill.

An analysis of the facts reveals that AT&T could not fulfill this criterion. First, AT&T ignores the "consumers" that Congress appeared to be referring to in Section 10(a)(2) – end users. Yet, evaluating the matter from the end user perspective is informative, since it appears that forbearance is likely to have little or no impact on the rates paid by end users. Because Section 254(g) of the Act requires IXCs to average interstate interexchange rates on a nationwide basis, the Commission has already found that any increase in access rates charged to IXCs would have a *de minimus* impact on interexchange rates charged to individual consumers. *See, Iowa Telecom*, 17 FCC Rcd at 24325, para. 19. Furthermore, even when considering the IXCs themselves as the consumers of access services, as was shown at pages 7-8 *supra*, there is no evidence that forbearance from enforcement of the "deemed lawful" provisions of Section 204 will "protect" AT&T from alleged overcharges.

C. The Petition Fails to Meet the Public Interest Criterion.

The third Section 10(a) criterion requires analysis as to whether the public interest would be served by forbearance from applying the proposed provision. Essentially, AT&T's Petition asserts that the public interest would be served in this case since the enforcement of Section 204(a)(3) allegedly "immunizes LECs from liability to their access customers for damages [from unreasonable tariff rates]", while the customers of "carriers who operate in the competitive marketplace enjoy unfettered ability to raise challenges to the lawfulness of [IXC rates]." Petition at page 18. Thus, according to AT&T, the public interest in competition would be served by not enforcing this anti-competitive protection of ILECs. This argument is flawed in many ways.

First, AT&T provides no evidence for the allegedly anti-competitive effect of Section 204(a)(3). AT&T's bare assertion of such effect is facially insufficient. Indeed, AT&T cannot make a case for an anti-competitive effect, because LEC provision of access services and IXC provision of interexchange services are two different services, and two different product markets. The fact that a regulation of one service in one product market is different than the regulation of a different service in a different product market, does not mean that the difference is anti-competitive, since by definition there is no direct competition between the providers to the two different product markets. In essence, AT&T's "anti-competitive" argument is an unadulterated "red herring."

If, however, AT&T is addressing the impact of Section 204(a)(3) on it not as an IXC, but rather as a CLEC, its anti-competitive argument still fails. As the Commission stated in the *Streamlined Tariff Filing R&O*, CLECs are entitled to make Section 204 streamlined access charge filings, and thus receive the same statutory protections that ILECs receive when the make such filings. 12 FCC Rcd at 2191-92. Furthermore, while the Commission forbears from requiring CLECs to file tariffs, it has done so on a permissive basis, and thus, CLECs still may make Section 204(a)(3) streamlined tariff filings. In the Matter of Hyperion Telecommunications, Memorandum Opinion and Order, 12 FCC Rcd 8596 (1997).

While AT&T fails to show how the enforcement of the “deemed lawful” provisions of Section 204(a)(3) is contrary to the public interest, SureWest notes that in fact that Section promotes the public interest in the provision of interstate access service. First, as the D.C. Circuit noted in the *ACS* case, “it is virtually impossible to tell in advance just what rate of return a given rate may yield.” 290 F.3d at 413. That uncertainty is the cause of over-earnings. Section 204(a)(3) limits the resulting uncertainties that filing carriers have regarding liabilities for damages if the rate earns more than the targeted rate of return. This added certainty allows filing carriers to better plan their network investments and thus provide better service to the public.[10] Similarly, limiting liability for rates that do not meet the targeted rate of return limits the impact of the “peaks and valleys” problem that arises when a carrier must disgorge overearnings, but is not allowed to recover from customers when rates earn less than their targeted rate of return. The Commission and the Courts have recognized the impact of this problem in

[10] *Cf. Iowa Telecom*, 17 FCC Rcd at 24327, noting the public interest in limiting uncertainty regarding rate changes that could impact other carriers.

the past,[11] and this problem may have been the basis for Congress enacting Section 204(a)(3).

In sum, AT&T's Petition generally provides insufficient or no evidence for its forbearance request, and no new policy basis for what is essentially an untimely petition for reconsideration of the Commission's rejection of its previous petition for reconsideration. Furthermore, the Petition fails to meet the specific Section 10(a) criteria. Accordingly, there is no basis for granting the Petition.

D. Grant of the Petition Would Turn Section 10 on its Head.

Not only does the Petition fail to meet the Section 10 criteria, grant of the Petition would in fact turn Section 10 on its head, by using that Section to impose regulatory burdens (on incumbent local exchange carriers), rather than to relieve regulatory burdens. Indeed, the Commission has already spoken on this issue in the *Streamlined Tariff Filings R&O*. In discussing the Congressional intent behind Section 10, and its relationship to Commission discretion to forbear from enforcing the tariff requirement on

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[11] *See, e.g.,* In the Matter of Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, Report and Order, 1985 FCC Lexis 2520, FCC 85-527 (1985), at para. 18; AT&T v. FCC, 836 F.2d 1386, 1390-91 (D.C. Cir. 1988)(holding that an automatic refund rule applied to ILECs is arbitrary and capricious because it creates a peak and valley problem). *But see*, MCI Telecommunications Corporation v. FCC, 59 F.3d 1407 (D.C. Cir. 1995) wherein the Court upheld FCC Orders requiring ILEC refunds of overearnings, because the Commission had (in response to the Court's AT&T v. FCC decision) revised its theory regarding the economic basis of rate of return regulation. SureWest believes that the Commission's revised theory is less than compelling, even though the Court upheld the Commission's discretion to change its theory.

a permissive or mandatory basis, the Commission stated that "we find that Congress intended [through the use of Section 10] to <u>reduce or eliminate</u> regulation as competition develops...." 12 FCC Rcd at 2190 (emphasis added). AT&T's Petition would not reduce or eliminate regulation of LECs, it would <u>increase</u> it. LECs would be subject to increased Section 208 complaint proceedings, with all of the attendant filings and regulatory burdens, regardless of whether the complaints have merit or not.

AT&T would not only turn Section 10 on its head by using it to increase rather than decrease regulation, but also by having forbearance applied <u>not to AT&T</u> as the petitioner, but rather only to <u>other</u> carriers. This approach is flatly inconsistent with the provision of Section 10(c) which states that "[a]ny telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section <u>with respect to that carrier</u> (emphasis added)..." *i.e.*, with respect <u>to the petitioner</u>. The Commission should not allow AT&T to impermissibly use the Section 10 process to impose regulations only on <u>other</u> carriers, *i.e.,* to use the process as a "sword" rather than as a "shield."

IV. <u>Conclusion</u>

As shown above, AT&T is trying to obtain through a different means, a result that the Commission has already rejected twice in the *Streamlined Tariff Filing* proceeding as inconsistent with Congressional intent. The Commission should not grant AT&T its third "bite at the apple." Such flouting of the Congressional intent behind Section 204(a)(3) would surely be reversed on appeal. Even on its face, though, not only does the AT&T Petition fail under the Section 10 forbearance criteria, it is in fact an attempt to turn Section 10 on its head by using it to impose regulatory burdens rather than to relieve regulatory burdens, and by using the Section 10 process as a sword rather than as a shield.

WHEREFORE, SureWest Communications requests that the Commission deny the Petition for Forbearance filed by AT&T Corp.

Respectfully submitted,

SUREWEST COMMUNICATIONS

/s/ Paul J. Feldman
Paul J. Feldman

Its Attorneys

FLETCHER, HEALD & HILDRETH, PLC
1300 North 17th Street, 11th Floor
Arlington, Virginia 22209
(703) 812-0400

January 30, 2004

CERTIFICATE OF SERVICE

I, Joan P. George, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that a true copy of the foregoing *Opposition of SureWest Communications* was sent this 30th day of January, 2004, via hand and electronic mail where indicated and via United States First Class Mail, postage prepaid, to the following:

Leonard J. Cali, Esq.
Lawrence J. Lafaro, Esq.
Peter H. Jacoby, Esq.
Room 3A251
One AT&T Way
Bedminster, NJ 07921

Chief Pricing Policy Division *
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-A221
Washington, DC 20554

Qualex International (qualexint@aol.com) **
Portals II
445 12th Street, SW, Room CY-B402
Washington, DC 20554

/s/ Joan P. George
Joan P. George

* By hand
** Electronic Mail